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U.S. COURTS

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14 *UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO*

15
16 UNITED STATES OF AMERICA)

17 vs.)

18 MITCHELL D. McBRIDE,
19 KIMBERLY McBRIDE,
20 DICK E. BUTCHER,

21 Defendants.)

CASE NO. 04-064-S-EJL

GOVERNMENT'S MOTION IN LIMINE -
RULE 609

22 The United States of America and Thomas E. Moss, United States Attorney for the District of
23 Idaho, through George W. Breitsameter, Assistant United States Attorney, request that the Court,
24 pursuant to Rule 103(c) of the Federal Rules of Evidence, make a preliminary ruling outside the presence
25 of the jury concerning the admissibility of the prior criminal records of a Government witness in this
26 case.

GOVERNMENT'S MOTION IN LIMINE -- RULE 609 - 1

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1 The Government submits that Brice Stille may be called in the Government's case-in-chief. Stille
2 pled guilty to first degree burglary and was sentenced on January 2, 2002, to a withheld judgment and
3 placed on probation. The defense may attempt to impeach said witnesses pursuant to Rule 609 of the
4 Federal Rules of Evidence:

5 Rule 609 provides in part:

6 Rule 609. Impeachment by Evidence of Conviction of Crime

7 (a) General rule. For the purpose of attacking the credibility of a witness,

8 (1) evidence that a witness other than an accused has been convicted of
9 a crime shall be admitted, subject to Rule 403, if the crime was punishable by
10 death or imprisonment in excess of one year under the law under which the
11 witness was convicted, and evidence that an accused has been convicted of such
12 a crime shall be admitted if the court determines that the probative value of
13 admitting this evidence outweighs its prejudicial effect to the accused; and

14 (2) evidence that any witness has been convicted of a crime shall be
15 admitted if it involved dishonesty or false statement, regardless of the punishment.

16 Fed.R.Evid.609.

17 FELONY CONVICTIONS WITHIN THE LAST TEN (10) YEARS - BALANCING TEST

18 The United States likewise requests the Court determine whether a withheld judgment imposed
19 on a plea of guilty to burglary should be excluded.

20 Rule 609(a)(1) of the Federal Rules of Evidence provides that the Court shall conduct a balancing
21 test to determine whether felony convictions are admissible. Such convictions are only admissible if this
22 Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to
23 the accused. Rule 609(a)(1) of the FRE.

24 In *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996), the Ninth Circuit considered whether
25 the District Court properly excluded two (2) prior felony convictions of a Government witness for,
26 respectively, theft and possession of narcotics. The Ninth Circuit stated:

While this ruling unquestionably would have been incorrect under *United States v. Nevitt*, 563 F.2d 406, 408 (9th Cir. 1977) ("The defendant may always use prior felony convictions of a prosecution witness."), *cert.*

1 denied, 444 U.S. 847, 100 S.Ct. 95, 62 L.Ed.2d 61 (1979), that case was
2 expressly abrogated by the 1990 amendments to the Federal Rules of
3 Evidence. Fed.R.Evid. 609, Advisory Committee's Note (1990). Under
4 the present version of Rule 609(a), a district court must apply "the general
5 balancing test of Rule 403 to protect all litigants against unfair
6 impeachment of witnesses. The balancing test protects ... the government
7 in criminal cases...." *Id.*; see also *United States v. Fugueroa*, 976 F.2d
8 1446, 1456 (1st Cir. 1992), *cert. denied*, 507 U.S. 943, 113 S.Ct. 1346, 122
L.Ed.2d 728 (1993). "In reviewing evidentiary rulings under Rule 609(a),
broad discretion should be given to the trial court and its decisions should
not be overturned absent an abuse of discretion." *United States v. Turner*,
995 F.2d 1357, 1363 (6th Cir.), *cert. denied*, 510 U.S. 904, 114 S.Ct. 282,
126 L.Ed. 2d 232 (1993); see also *United States v. Browne*, 829 F.2d 760,
762 (9th Cir. 19987), *cert. denied*, 485 U.S. 991, 108 S.Ct. 1298, 99
L.Ed.2d 508 (1988).

9 The district court did not abuse its discretion when it refused to allow
10 Rowe to impeach Wilson with her theft conviction. Applying the Rule
11 403 balancing test to this offense, which occurred in 1988, the court stated
12 that the crime had "a lot of prejudice and almost no probative value." The
13 court thought that questioning Wilson about this conviction, which was
14 for theft of an automobile, might allow the jury to improperly infer that
15 the victim had stolen the car she was driving on the night of the
16 carjacking. In fact, though, the owner of the carjacked automobile
17 admitted to the police that Wilson was operating the vehicle with his
18 consent. This set of facts convinces us that the district court acted within
19 its broad discretion when it determined that Rule 403 counseled against
admission of the conviction.

20 We acknowledge that we have more serious reservations about the district
21 court's decision to limit cross-examination of Wilson concerning her
22 relatively recent conviction for possession of illegal drugs. It seems to us
23 that information regarding this narcotics crime had substantial probative
24 value under the relevant facts. Nonetheless, even assuming, without
25 deciding, that the court abused its discretion in disallowing impeachment
26 on this issue, we find that the error was harmless in this case because there
was considerable independent evidence to support the verdict.

Id. at 933.

21 Although Idaho law is not controlling on this issue, it is important to note that the Idaho Supreme
22 Court has held that a withheld judgment is not a conviction. *State v. Client*, 96 ID 646, 650, 534 P.2d
23 476 (ID 1975).¹

24
25 ¹In *Client*, the Court stated:

26 To withhold judgment after a plea of guilty protects the defendant at that
time against the stigma of a conviction which may be forever avoided
should the defendant conform to its terms and conditions. This creates,

1 The Government respectfully submits that the probative value of the withheld judgment of Stille
2 is outweighed by its prejudicial effect. On this ground, the Court should find the convictions are
3 inadmissible.

4 For the foregoing reasons, we respectfully request that this Court exclude reference to the afore-
5 referenced matters.

6 DATED this 6th day of August, 2004.

7 THOMAS E. MOSS
8 United States Attorney

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11 George W. Breitsameter
12 Assistant United States Attorney
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23 and rightfully so, a hope in the heart of the accused that he may ultimately
24 be released under an order of probation without the stigma of a judgment
25 of conviction. This is an incentive for complete rehabilitation and reform,
26 one of the salutary objectives of the Act.” 73 Idaho at 479, 252 P.2d at
796.

(See *United States v. Hamilton*, 48 F.3d 149, 152-153 (5th Cir. 1995), upholding exclusion of deferred adjudication of guilt.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6 day of August, 2004, a copy of the foregoing
GOVERNMENT'S MOTION IN LIMINE - RULE 609 was served by:

☒ United States Mail, postage prepaid

☐ Hand-delivery

☐ Facsimile transmission (FAX)

☐ Federal Express

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